

KENNETH SAFFER)	
Claimant)	
)	
VS.)	
)	
STAR CONSTRUCTION, INC.)	
Respondent)	Docket No. 1,030,669
)	
AND)	
)	
CONTINENTAL WESTERN INS. CO.)	
Insurance Carrier)	

Claimant argues the Board does not have jurisdiction to review this matter and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

As this is an appeal from a preliminary hearing order the Board must determine if there is a jurisdictional basis to review the ALJ's Order at this stage of the proceedings. K.S.A. 44-551 limits the jurisdiction of the Board. The Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction or where one of the specific jurisdictional issues identified in K.S.A. 44-534a is raised. A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment benefits is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation.

Initially, it must be noted that there is no appeal from the ALJ's determination that respondent should reimburse the prescription expenses in claimant's exhibit two as unauthorized medical treatment. Again, had either party appealed from that determination the Board would not have jurisdiction to address that issue upon an appeal from a preliminary hearing.

The Board can also exercise jurisdiction on an appeal from a preliminary hearing order if the ALJ exceeded his jurisdiction in granting or denying the relief requested.¹ This preliminary hearing came before the ALJ upon claimant's request for reimbursement for payment of certain prescription drugs. The sole issue was whether the claimant should be reimbursed. The respondent argued that the drugs were not prescribed by the authorized treating physician. The ALJ agreed but ordered that they be paid as unauthorized medical. But the ALJ further designated a nurse provide continued medical treatment consisting of prescribing medications/pain management. Respondent contends the Board has jurisdiction of this appeal because the ALJ's Order For Medical Treatment constituted a denial of due process. This Board Member agrees.

The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case.²

No particular form of proceeding is required to constitute due process in administrative proceedings; all that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements

¹ K.S.A. 44-551(b)(2)(A).

² *Collins v. Kansas Milling Co.*, 207 Kan. 617, 620, 485 P.2d 1343 (1971).

include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason; and its essential requirements are met where the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.

Whether or not a person has been deprived of due process of law by the action of an administrative agency or body depends on whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination. Denial of due process occurs where the exercise of power by an administrative officer or body is arbitrary or capricious, where a decision of a board or commission is based on mere guesswork as to an essential element, or where a finding is unsupported by any evidence.³

The Board has previously found that an action by the ALJ which constituted a denial of due process exceeded the ALJ's jurisdiction under K.S.A. 44-551.⁴ The ALJ while having the authority to decide a case incorrectly, cannot make a decision on an issue which is not before him. And to make such a decision without giving the parties notice and an opportunity to be heard and present evidence on the issue constitutes an unreasonable, arbitrary and capricious act on the ALJ's part which denies due process to the parties involved. Such an act exceeds the discretion and jurisdiction of the ALJ.

[T]he discretion vested in administrative officers and agencies is not absolute or unlimited. Administrative discretion must be exercised in accordance with the law, including applicable constitutional provisions, and those of statutes and regulation. The discretion must be exercised in accordance with the established principles of justice, and with skill, sound judgment, and probity. Their action must be both legal and reasonable, and fair toward those with whom they deal.⁵

The Board finds the ALJ exceeded his jurisdiction and authority when he addressed an issue not properly noticed nor otherwise before him, i.e., the issue whether claimant should receive additional medical treatment before the final award. The respondent did not have an opportunity to present evidence on that issue and, therefore, the respondent was denied due process of law. The ALJ's order designating Nurse Bridge to provide medical treatment should be set aside.

³ 73 C.J.S. *Public Administrative Law and Procedure* § 59; See also *Johnston Coal & Coke Co. v. Dishong*, 198 Md. 467, Syl. ¶ 5, 84 A. 2d 847 (1951); *Kaufman v. Kansas Dept. of SRS*, 248 Kan. 951, 811 P.2d 876 (1991); *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 807 P.2d 652 (1991); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 770 P.2d 423 (1989)

⁴ See also *Church v. White Star Commercial Coating and McPherson Contractors, Inc.*, Docket No. 204,042, 1999 WL 1314831 (Kan. WCAB. Dec. 30, 1999).

⁵ 73 C.J.S. *Public Administrative Law and Procedure* § 60.

The claimant may preserve the issue for final award as provided by K.S.A. 44-534a(a)(2). That statute provides in pertinent part:

Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

WHEREFORE, it is the finding of this Board Member that the part of the Order of Administrative Law Judge Brad E. Avery dated June 30, 2009, providing medical treatment with Nurse Bridge is set aside.

IT IS SO ORDERED.

Dated this 30th day of September 2009.

DAVID A. SHUFELT
BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

⁶ K.S.A. 44-534a.

⁷ K.S.A. 2008 Supp. 44-555c(k).